No. 83-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEATRAIN LINES, INC., and
J & J DENHOLM MANAGEMENT, LTD.,

Petitioners,

—against—

JOHN CARCICH, PASQUALE INTRONA
and VINCENZA INTRONA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

REPLY OF PETITIONERS SEATRAIN LINES, INC. and J & J DENHOLM MANAGEMENT, LTD.

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REPLY OF PETITIONERS SEATRAIN LINES INC. AND J & J DENHOLM MANAGEMENT, LTD. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION - FIRST DEPARTMENT

In this longshoremen's personal injury action five claims of liability of the shipowner, J & J Denholm Management, Ltd. and terminal owner, Seatrain Lines, Inc. were submitted to a jury which returned a general verdict. These were:

1. That the presence underdeck of two 20 foot containers not locked to a flatrack "created a dangerous condition" for which defendants might be liable, because of having created the condition, or failing to warn the stevedore of its existence [24A-25A]*;

2. That since ship's officers knew or should have known of the presence of "dangerous substances" in the 20 foot containers about to be unloaded they had the

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* Reference followed by the letter "A" are to page numbers of the Appendices to the Petition for Writ of Certiorari previously filed.

obligation imposed by regulation to be personally present observing the manner of "handling" of the cargo, which might "have made a difference" [26A-27A];

3. That since the attempted discharge of the two 20 foot containers by "a single pick" could have been "prevented" by the expedient of blocking an appropriate corner casting of one of the 20 foot containers with a so-called "shear key" and, hence, making it "physically impossible to make that single pick," defendants could be found negligent for not adopting this "alternative method in (sic) which this accident could have been prevented" [28A];

4. That had there been adequate lighting, and "[if] one of the parties who could have supplied...[it] was shipboard personnel, by either switching on the lights or by rigging portable lights; that [if] the failure to do that contributed to the happening of the accident," defendants could be liable [28A-29A];

5. That defendants could be found liable in the event "those center twist locks, which were originally part of the equipment on that spreader, had been on the spreader

on the date of the accident, the crane operator could have activated them and possibly have locked into the centers... [in time to have] prevented the containers from falling" [31A].

Argument

In opposition to this petition, respondents urge that no federal right can be shown to have been infringed in the proceedings in the courts of the State of New York. This argument is predicated upon the assertion that questions of fact prevent this Court from assessing the legal issue, and for this reason the $3,500,000 judgment in respondents' favor cannot be reviewed.

The law of the State of New York, with respect to whether a new trial must be granted, in a case where a general verdict has been returned, if but one of the theories of liability submitted to the jury is found untenable, is the same as the federal law: in such event, a new trial must be granted. See Sobel v. City of New

York, 9 A.D.2d 271 (1st Dept. 1959); Carroll v. City of New York, 37 Misc. 2d 563 (S.Ct. Bx. Cty. 1962) aff'd, 25 A.D.2d 841 (1st Dept. 1966). See also, Bollenbach v. United States, 326 U.S. 607 (1946); Evans v. Transportacion Maritime Mexicana, 639 F.2d 848 at 860 (2 Cir. 1981). Moreover, under the law of the State of New York, where the charge with reference to the issues and the applicable law is so inadequate as to preclude fair consideration by the jury of the issues, the judgment must be reversed and a new trial ordered. U.S. Vitamin & Pharmaceutical Corporation v. Capital Cold Storage Company, Inc., 21 A.D.2d 661 (1st Dept. 1964); Eisner v. Daitch Crystal Dairies, Inc., 27 A.D.2d 921 (1st Dept. 1967).

There is no question that there were disputed factual issues, principally having to do with the suggestion by respondents that the flatracks were designed for purposes other than securing cargo, and, in fact, were "intended" to allow two 20 foot containers to be lifted as a single unit by a 40 foot spreader. But the existence of this issue does not deny this Court opportunity for review

and, indeed, the requirement that each issue of liability be independently sufficient establishes beyond doubt that the courts of the State of New York failed, by holding that all respondents' claims were legally sufficient, to follow the federal law with respect to "third-party" liability in a 33 U.S.C. §905(b) case laid down in Scindia Steamship Navigation Co. v. De Los Santos, 451 U.S. 156 (1981).

As an example, respondents' claim of liability expressed in paragraph (3) above -- that the shipowner could be liable for not having fitted one of the corner castings of one of the 20 foot containers with a "shear key" and thus not adopting the trial court's "alternative method in which the accident could have been prevented" -- must itself, without consideration of the other claims of petitioners' negligence, have been found to be legally sufficient: if it was not, a new trial would have been ordered. For this reason, this Petition perfectly frames the wholly legal issue whether the New York courts correctly concluded that a charge allowing the jury to find a

shipowner liable to a longshoreman simply for failing to anticipate a negligent act by the stevedore properly supports an award of damages. Since the jury could have found that the stow plan description of the size and location of the underdeck 20 foot containers was adequate warning of any said-to-be dangerous condition (because 20 foot containers whether or not locked to a flatrack were, as a matter of terminal practice, always suppposed to be discharged singly), this shipowner, under the court's charge, could have been found liable on account of the absence of the "shear key" only if burdened with a duty to take all such steps, in anticipation of the stevedore's negligence (in failing to give the longshoremen working the hatch a copy of the perfectly adequate stow plan), so as to render conditions aboard ship accident-proof. This species of liability, common in products liability law, (see, Pastorello v. Koninklijke Nederl Stoomb Maats, 456 F. Supp. 882, 887 (EDNY 1978)) has absolutely no place in federal law governing longshoremen's cases since passage

of the 1972 Amendments to the Longshoremens' and Harbor Workers' Compensation Act. And this Court has so held.

As was specifically held in Scindia Steam Navigation Co. v.De Los Santos, supra (at p. 168), a shipowner cannot be liable on account of stevedore negligence. Whatever else, this must mean that although a shipowner can be found liable for failing to intervene when aware of the stevedore's "obvious improvidence," it cannot be liable simply because it failed to anticipate that such negligence might occur.

Since at least one improper "theory" of liability was presented to the jury as a basis for finding petitioners' liability -- one so obviously and recently proscribed by the controlling decision of this Court -- the Petition should be granted and the case remanded to the Appellate Division, First Department with instructions to follow federal law. For it is perfectly obvious that the courts of the State of New York, instead of following such law, applied the law of the State. This law (see e.g., Dole v.

Dow Chemical Corp., 30 N.Y.2d 143, 282 N.E.2d 288 (1972)) allows a third party to recover contribution from an employer which has paid what are, under the workmens' compensation statute applicable in New York, inadequate benefits. But under federal law these respondents' employer, this woefully negligent stevedore, recovers its compensation "lien" and is absolved (by virtue of the size of the verdict) of all future liability, for adequate compensation benefits, which would have otherwise been payable, had there been a proper charge, and hence, very likely a verdict in petitioners' favor. And this as a result of injuries unquestionably caused by stevedore negligence of the grossest kind.

Respectfully submitted,

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